JSB v. ACSB

COURT OF APPEAL, PUTRAJAYA
LEE SWEE SENG JCA
CHE MOHD RUZIMA GHAZALI JCA
AZIZUL AZMI ADNAN JCA
[CIVIL APPEAL NO: P-02(IM)(NCVC)-2008-10-2022]
27 OCTOBER 2023

Abstract – *(i) By praying for both striking out, and alternatively, stay of proceedings, an applicant might think it is acting on an abundance of caution or trying to have the best of both worlds. In reality, such applicant is making an irrevocable choice or election to get the court to decide on the merits or the lack of it of a claimant's claim. Having succumbed and surrendered to the court's jurisdiction, it can no longer escape from it. It is unlike a fail-safe mechanism where in the event of a specific failure in striking out, there is the alternative route of little impact in a stay of the proceedings; (ii) The effect of not paying one's share of the arbitrator's fees would be that the arbitrator is not obliged to continue with the hearing and may terminate the arbitration before him. Parties are then at liberty to pursue litigation in court as the arbitration agreement has been rendered inoperative.*

CIVIL PROCEDURE: *Striking out – Application for – Arbitration – Parties in arbitration given notice to pay further deposit of arbitrator's fees and administrative costs – One party refused to pay ('refusing party') – Arbitrator terminated arbitration – Aggrieved party ('claimant') filed claim in High Court – Refusing party applied to have claimant's writ and statement of claim struck out and alternatively, for stay of court proceedings for matter to be referred to arbitration – Whether refusing party invoked jurisdiction of court and taken fresh steps in proceedings – Whether refusing party could submit itself to court's jurisdiction and surrender to it in applying to strike out claim and at same time apply for stay of proceedings in alternative – Whether stay of court proceedings would be exercise in futility since refusing party resolutely resolved not to pay arbitrator's fees – Rules of Court 2012, O. 12 r. 10(1)(a) & (g), O. 18 r. 19(1)(a), (b), (c) & (d) & O. 92 r. 4 – Arbitration Act 2005, s. 10*

ARBITRATION: *Effect of – Agreement – AIAC Arbitration Rules – Compliance – Parties in arbitration given notice to pay further deposit of arbitrator's fees and administrative costs – One party refused to pay – Arbitrator terminated arbitration – Whether arbitration agreement rendered inoperative by refusal to comply with requirement of AIAC Arbitration Rules – Whether stay of court proceedings would be exercise in futility – Arbitration Act 2005, s. 10*

The appellant ('plaintiff') and the respondent ('defendant') were parties in an arbitration which had proceeded at the preliminary stage of settling the pleadings. When the Asian International Arbitration Centre ('AIAC') gave notice to the parties for a further deposit of the arbitrator's fees and the administrative costs of the AIAC ('AIAC's deposit'), the defendant, who also had a counterclaim, refused to pay its portion of the fees. The arbitrator then proceeded to terminate the arbitration. The plaintiff filed its claim in the High Court. The defendant objected to the said claim on the ground that the arbitration agreement was still subsisting and was not abrogated on the ground of it not paying its portion of the AIAC's deposit. According to the defendant, the recourse would be for the plaintiff to pay the defendant's equal share of the AIAC's deposit to continue with the arbitration and to then ask for the arbitrator to include in the final award, the AIAC deposit, paid on its behalf by the plaintiff. The defendant applied to have the plaintiff's writ and statement of claim struck out under O. 18 r. 19(1)(a), (b), (c) and (d) of the Rules of Court 2012 ('ROC'). Alternatively, the defendant prayed for a stay of the court proceedings under s. 10 of the Arbitration Act 2005 ('AA') and for the matter to be referred to arbitration. The High Court held that (i) the non-payment of the AIAC's deposit by the defendant did not render the arbitration agreement inoperative or incapable of being performed; and (ii) the plaintiff as the claimant in the arbitration could pay the defendant's share of the AIAC's deposit and recover the same from the defendant in the final award of the arbitrator. The High Court ordered a stay of proceedings under s. 10 of the AA. Hence, the present appeal. The issues that arose in this appeal were: (i) whether in applying to strike out the High Court suit brought by the plaintiff, the defendant had invoked the jurisdiction of the court and had taken fresh steps in the proceedings; (ii) whether the arbitration agreement had become inoperative within the meaning of s. 10 of the AA; and (iii) whether a stay of the court proceedings would be an exercise in futility as the defendant had resolutely resolved not to pay the AIAC's deposit.

Held (allowing appeal and setting aside order of High Court; matter shall proceed to trial in High Court):
Per Lee Swee Seng JCA delivering the judgment of the court:

(1) In invoking O. 12 r. 10(1)(a) and (g) and O. 18 r. 19(1)(a), (b), (c) and (d) and the inherent jurisdiction of the court under O. 92 r. 4 of the ROC, in the body of its application, the defendant had invited the court and hence, invoked its jurisdiction to consider the merits of the plaintiff's proceedings in court with a view to have them struck out on the grounds set out in its application. The merits of the plaintiff's claim or the lack of it would have to be considered by the court in hearing the application. Clearly by doing so, the defendant had taken 'any other steps in the proceedings' such that if the court were to dismiss, disallow or even disregard the application, the court's jurisdiction would have been

invoked upon the invitation being made before the court by way of the prayers in the application. The applicant in the defendant could not submit itself to the court's jurisdiction and surrender to it in applying to strike out the plaintiff's claim and yet at the same time apply for a stay of proceedings should it not succeed in the striking out. Having entered the door of the court and inviting it to decide on the matter on its merits, the defendant could not now exit from it and merely pray for a stay of the proceedings. The defendant had submitted and surrendered to the jurisdiction of the court and waived its right to arbitration. Having succumbed to the court's jurisdiction, the defendant could not now switch to arbitration to resolve the dispute between the parties. (paras 18, 20, 21 & 36)

(2) Compliance with an arbitration agreement would include compliance with the applicable AIAC Arbitration Rules ('Rules') that the parties have agreed to abide by. A breach of the Rules would result in taking the consequences that would ensue. Here, the arbitrator was doing what was allowed under the Rules which in this case, included the arbitrator exercising his right to terminate the arbitration. The defendant could not say that it was committed to having the dispute that had arisen between the parties to be resolved through arbitration and yet not be willing to abide by the Rules governing the arbitration to pay its share of the AIAC's deposit which included the arbitrator's fees. The arbitration agreement had been rendered inoperative by the refusal of the defendant to comply with the requirement of the Rules that each party shall contribute equally towards the AIAC's deposit or further deposit to cover the arbitrator's fees and the AIAC's administrative costs. The non-payment of the arbitrator's fees would have the effect of scuttling the arbitration for there was no good reason not to pay equally the AIAC's deposit and claim back from the losing party. The defendant was not entitled to take advantage of its own breach and insist on continuing with the arbitration. It would be a case of the defendant not walking its talk. (paras 41, 42, 68, 69 & 72)

(3) The dogged determination of the defendant in not wanting to pay its share of the AIAC's deposit, even up to the hearing of this appeal, showed that the defendant had taken a calculated stand consistent with the strategy it had adopted. The defendant saw it as its right not to have to pay to the AIAC the deposit required under the Rules and so gave no reason for its stand. No further opportunity to pay would be necessary nor appreciated in this case where the defendant by its action had waived its right to arbitration. To stay the proceedings in court would be an exercise in futility and tantamount to the court having acted in vain and frustrating further the plaintiff's attempt to have the dispute heard and resolved with all due diligence and without further delay. The High Court erred in granting a stay of the court proceedings in favour of a reference to arbitration. (paras 97-100)

Case(s) referred to:

AMDAC (M) Sdn Bhd v. BYD Auto Industry Company Ltd [2020] 6 CLJ 625 HC ***(refd)***

BDMS Limited v. Rafael Advanced Defence Systems [2014] EWHC 451 ***(refd)***

Dato' Abd Rahim Mohamad v. Abdul Farish Rashid [2009] 1 CLJ 395 CA ***(refd)***

Golden Plus Holdings Bhd & Ors v. China Idea Development Limited & Ors [2021] 1 LNS 2083 HC ***(refd)***

Government of Swaziland Central Transport Administration and Alfko Aussenhandels GMBH v. Leila Maritime Co Ltd An Mediterranean Shipping Co SA (The "Leila") [1985] 2 Lloyd's Rep 172 ***(refd)***

Kawasaki Kisen Kaisha, Ltd v. Owners Of The Ship Or Vessel "Able Lieutenant" [2002] 7 CLJ 478 HC ***(refd)***

Kebabangan Petroleum Operating Company Sdn Bhd v. Mikuni (M) Sdn Bhd & Ors [2021] 7 CLJ 544 CA ***(refd)***

L Capital Jones Ltd And Another v. Maniach Pte Ltd [2017] SGCA 3 ***(refd)***

Lembaga Pelabuhan Kelang v. Kuala Dimensi Sdn Bhd & Another Appeal [2010] 9 CLJ 532 CA ***(refd)***

Lion Pacific Sdn Bhd v. Pestech Technology Sdn Bhd [2022] 1 LNS 135 HC ***(refd)***

Malloch v. Aberdeen Corp [1971] 1 WLR 1578 ***(refd)***

PP Persero Sdn Bhd v. Bimacom Property & Development Sdn Bhd [1999] 6 CLJ 275 HC ***(refd)***

Press Metal Sarawak Sdn Bhd v. Etiqa Takaful Bhd [2016] 9 CLJ 1 FC ***(refd)***

Said Dharmalingam Abdullah v. Malayan Breweries (Malaya) Sdn Bhd [1997] 1 CLJ 646 SC ***(refd)***

Legislation referred to:

AIAC Arbitration Rules 2018, rr. 6, 14(1), (4), (7)

Arbitration Act 1952 (repealed), s. 6

Arbitration Act 2005, ss. 8, 10(1), (2), 19(1), (2)(e), 21(3)(d), (i)

Contracts Act 1950, s. 29

Courts of Judicature Act 1964, s. 23

Rules of Court 2012, O. 12 rr. 9, 10(1)(a), (g), O. 18 r. 19(1)(a), (b), (c), (d), O. 92 r. 4

Rules of the High Court 1980, O. 12 r. 7, O. 18 r. 19

Arbitration Rules of the Singapore International Arbitration Centre [Sing], r. 34.6

Other source(s) referred to:

Eamon and Holub, *See you in court! Respondents' failure to pay the advance on arbitration costs* (2009) Int ALR 168

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[Editor's note: Appeal from High Court, Pulau Pinang; Civil Suit No: PA-22NCVC-32-02-2022 (overruled).]

Reported by Lina E

JUDGMENT

Lee Swee Seng JCA:

[1] An interesting problem has arisen in an arbitration which had proceeded at the preliminary stage of settling the pleadings and when the Asian International Arbitration Centre ("AIAC") gave notice to the parties for a further deposit of the arbitrator's fees and the administrative costs of AIAC ("AIAC's deposit"). The respondent there, who also had a counterclaim, refused to pay its portion of the fees. The arbitrator then proceeded to terminate the arbitration after consultation with the Director of AIAC as provided for in the AIAC Arbitration Rules 2018 ("AIAC Arbitration Rules"). The claimant then proceeded to file its claim in the High Court.

[2] The defendant in the High Court objected on the ground that the arbitration agreement is still subsisting and is not abrogated on the grounds of it not paying its portion of the AIAC's deposit. According to the defendant, the recourse would be for the claimant to pay the defendant's equal share of the AIAC's deposit to continue with the arbitration and to then ask for the arbitrator to include in the final award, the AIAC's deposit, paid on its behalf by the claimant.

[3] The defendant in the High Court, by way of encl. 6, applied to have the writ and statement of claim struck out under O. 18 r. 19(1)(a), (b), (c) and (d) of the Rules of Court 2012 ("ROC 2012"). Alternatively, the defendant prayed for a stay of the court proceedings under s. 10 of the Arbitration Act 2005 (Act 646) ("AA 2005") and for the matter to be referred to arbitration.

[4] The claimant, on the other hand, argued that non-payment of the AIAC's deposit as required under the rules governing the arbitration, in this case, the AIAC Arbitration Rules, would amount to a breach of the arbitration agreement and as such the arbitrator is at liberty to terminate the arbitration and the claimant is entitled to then commence the proceedings in court. Previously, the claimant had filed a suit in court but withdrew it because of the defendant's insistence on the arbitration agreement.

At The High Court

[5] The High Court found that the non-payment of the AIAC's further deposit by the defendant did not render the arbitration agreement inoperative or incapable of being performed.

[6] The plaintiff, as the claimant in the arbitration, could pay the defendant's share of the AIAC's further deposit and recover the same from the defendant in the final award of the arbitrator.

[7] The High Court, having found that principally the arbitration agreement had not become inoperative, ordered a stay of the High Court proceedings under s. 10 of the AA 2005. The plaintiff, being dissatisfied with the decision of the High Court, had appealed to the Court of Appeal. The parties shall be referred to as they were in the High Court *ie*, as plaintiff and defendant respectively. In some instances, the defendant who refused to pay its portion of the AIAC's deposit would be referred to as the "refusing party."

Before The Court Of Appeal

[8] The plaintiff as appellant, argued before us that had the High Court followed the principle of law enunciated in *Kebabangan Petroleum Operating Company Sdn Bhd v. Mikuni (M) Sdn Bhd & Ors* [2021] 7 CLJ 544; [2021] 1 MLJ 693 with respect to when an arbitration agreement becomes inoperative, the High Court would not have granted an unconditional stay of the court proceedings, only to refer the matter to arbitration again.

[9] The plaintiff further argued before us that had the High Court followed the relevant principles of law as propounded by the full Bench of the Singapore Court of Appeal in *L Capital Jones Ltd And Another v. Maniach Pte Ltd* [2017] SGCA 3; [2017] 1 SLR 312, the High Court would have dismissed the defendant's application for a stay of the court proceedings.

[10] It was also submitted that the High Court had erred in not fully appreciating that under r. 14(7) of the AIAC Arbitration Rules, "the arbitral tribunal may, after consultation with the director, order the suspension or termination of the arbitral proceedings or any part thereof." It was further argued that the learned High Court Judge failed to appreciate that the learned Arbitrator's first order, whereby he ordered that the defendant could not proceed with its counterclaim and its third-party proceedings was, in fact, not in accordance with r. 14(7). The relevant facts showed that he had not, in fact, consulted the director when he made his first order.

Whether In Applying To Strike Out The High Court Suit Brought By The Plaintiff, The Defendant By So Doing Has Invoked The Jurisdiction Of The Court And Taken Fresh Steps In The Proceedings

[11] Under s. 10(1) of the AA 2005, the court would have no discretion but to make an order staying the proceedings before it in a matter which is the subject of an arbitration agreement unless the party making the stay application has taken other steps in the proceedings or that on the evidence before it, the court finds that the arbitration agreement is null and void, inoperative or incapable of being performed.

[12] Section 10(1) of the AA 2005 reads as follows:

> **10 Arbitration agreement and substantive claim before court**
>
> (1) A court before which proceedings are brought in respect of a matter which is the subject of an arbitration agreement shall, where a party makes an application **before taking any other steps in the proceedings**, stay those proceedings and refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed. (emphasis added)

[13] Thus, an application under s. 10 of the AA 2005 cannot be a hybrid application in combination with other provisions under the Rules of Court 2012. This is precisely because the court would have no business to interfere or intervene in a matter which is the subject of an arbitration agreement unless expressly provided for under the AA 2005 as stated clearly in s. 8 thereof as follows:

> **8. Extent of court intervention**
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> No court shall intervene in matters governed by this Act, except where so provided in this Act.

[14] Here, the main prayer is for a striking out of the plaintiff's claim under O. 12 r. 10(1)(a) and (g), O. 18 r. 19(1)(a), (b), (c) and (d) of the ROC 2012 and under O. 92 r. 4 of the ROC 2012 and only in the alternative, a stay of the proceedings in court under s. 10 of the AA 2005 and/or the inherent jurisdiction of the court.

[15] It should be stated at this juncture that O. 12 r. 10 is designed for setting aside the writ or service of the writ in a case where under O. 12 r. 9, the writ or the service of the writ is irregular or in any order giving leave to serve the writ out of jurisdiction or the extending the validity of the writ for the purpose of service. It has no application in this case whatsoever.

[16] As can be seen, the main prayer under para. 2 of the application is for the writ of summons and statement of claim dated 15 February 2022 against the defendant in the action to be struck out. It is only at para. 4 of the application there is an alternative prayer for the stay of the court proceedings under s. 10 of the AA 2005 and a reference by the plaintiff to arbitration until the arbitration is concluded and disposed of with an arbitral award.

[17] Such an application to strike out the plaintiff's action would be tantamount to "taking any other steps in the proceedings" and thus, the applicant is disqualified from applying for a stay of the proceedings. It does not matter that the court did not agree with its striking out application or that it dismissed the striking out application. Once the court is invited to consider the application to strike out the suit before it, the applicant would have invoked the jurisdiction of the court and submitted to its jurisdiction in "taking any other steps in the proceedings" and hence, can no longer apply for a stay of the proceedings on the ground that the matter before the court is the subject of an arbitration agreement.

[18] We agree with the plaintiff that the applicant in invoking O. 12 r. 10(1)(a) and (g) and O. 18 r. 19(1)(a), (b), (c) and (d) and the inherent jurisdiction of the court O. 92 r. 4, in the body of its application, the defendant had invited the court and hence invoked its jurisdiction, to consider the merits of the plaintiff's proceedings in court with a view to having them struck out on the grounds set out in its application.

[19] One of the grounds of the prayer to strike out the plaintiff's claim is contained in para. k of the application which reads as follows:

> k. The Plaintiff's claim against the Defendant is outside or in excess of the court's jurisdiction, flawed, defective and without basis, frivolous and vexatious and an abuse of the court's process and has a serious effect on the legal rights of the Defendant under the construction contract and should be struck out *in limine*.

[20] The merits of the plaintiff's claim or the lack of it, would have to be considered by the court in hearing the application. Clearly, by so doing, the defendant as applicant had taken "any other steps in the proceedings" such that if the court were to dismiss, disallow or even disregard the application, the court's jurisdiction would have been invoked upon the invitation being made before the court by way of the prayers in the application.

[21] The applicant in the defendant cannot submit itself to the court's jurisdiction and surrender to it in applying to strike out the plaintiff's claim and yet, at the same time, apply for a stay of the proceedings should it not succeed in the striking out. Having entered the door of the court and inviting it to decide on the matter on its merits, the applicant cannot now exit from it and merely pray for a stay of the proceedings.

[22] The two are incompatible and having failed in striking out the plaintiff's claim, the applicant must be content to having to contest the proceedings for in applying to strike out, the applicant must be taken to have abandoned arbitration in favour of litigation in the court.

[23] Consider for a moment that should the court have allowed the striking out, the plaintiff could no longer commence arbitration to adjudicate on the matter for estoppel and *res judicata* would operate against the plaintiff.

[24] The only recourse left for the plaintiff would be to appeal against that decision to the Court of Appeal. By praying for both striking out and alternatively for a stay of proceedings, the applicant might think it was acting on an abundance of caution or trying to have the best of both worlds. However, in reality, the applicant was making an irrevocable choice or election to get the court to decide on the merits or the lack of it of the plaintiff's claim. Having failed in doing so, it was too late to resile from it as the court's jurisdiction, once invoked, cannot be revoked or resisted.

[25] Having submitted and surrendered to the court's jurisdiction, it has succumbed to it under its spell; it can no longer escape from it but must swim or sink within its system. It is unlike a fail-safe mechanism where in the event of a specific failure in striking out, there is the alternative route of little impact in a stay of the proceedings.

[26] The problem is not new. As far back as 1999 under the previous s. 6 of the Arbitration Act 1952 (Act 93) (repealed by the Arbitration Act 2005) ("AA 1952"), Abdul Malik Ishak J (later JCA) had the opportunity to decide on the same issue in *PP Persero Sdn Bhd v. Bimacom Property & Development Sdn Bhd* [1999] 6 CLJ 275; [1999] 6 MLJ 1. In that case, the defendant had filed an application for a stay of proceedings pending a reference to arbitration under s. 6 of the AA 1952 which is the precursor to the present s. 10 of the AA 2005. The defendant had included in the application in prayer (1) to encl. 17, a prayer for striking out the plaintiff's writ. The plaintiff raised a preliminary objection that the inclusion of the prayer in the defendant's application constituted a step in the proceedings and thus, the defendant was barred from applying for a stay of proceedings. The High Court agreed with the Senior Assistant Registrar who had allowed the preliminary objection and struck out the defendant's application.

[27] The High Court held as follows at p. 22:

> (4) … *By seeking to strike out the plaintiff respondent's claim, the defendant appellant was submitting to the jurisdiction of this court. This would be the only inference that can be drawn when the defendant appellant incorporated prayer (1) to encl 17.* It must be emphasised that the court will not accede to an application to strike out the writ or the pleading unless the case was wholly and clearly unarguable. In my judgment, *the defendant appellant must be precluded from obtaining a stay and taking advantage of the remedy of arbitration when they inserted prayer (1) in encl 17.*
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> (5) The conduct of the defendant appellant in seeking prayer (1) of encl. 17 clearly *demonstrated a desire to abandon the application for a stay in favour of allowing the matter to proceed to trial. As I said the very act of the defendant appellant have the classical effect of invoking the jurisdiction of this court to proceed to hear the case in open court and not to refer the matter to arbitration nor to stay the matter.* This was my judgment and I so hold accordingly.
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> (6) By seeking prayer (1) of encl 17, *the defendant appellant had taken the necessary steps in the proceedings thereby precluding a stay and reference to arbitration. In my judgment, the defendant appellant did not unequivocally elect to refer the matter to arbitration.* In the 'technical sense', the defendant appellant took a step in the proceedings thereby barring resort to s. 6 of the Arbitration Act 1952. Clearly therefore the defendant appellant had no desire to stay the proceedings nor to refer the matter to arbitration. Incidentally, there was no bar for the defendant appellant to file a stay of proceedings after entering a conditional appearance. Sadly, this was not resorted to. Instead, the defendant appellant incorporated prayer (1) to encl 17.
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> (emphasis added)

[28] Our Court of Appeal had the occasion more recently to consider the same issue in *Kebabangan Petroleum Operating Company Sdn Bhd v. Mikuni (M) Sdn Bhd & Ors* [2021] 7 CLJ 544; [2021] 1 MLJ 693 where it said:

> [43] The facts in our case are similar as in *L Capital Jones* (*supra*). *The respondents had first prayed for the civil suit to be struck out and in the alternative, a prayer for a stay of proceedings of the court action pending arbitration in encl. 24. The respondents in praying, first, for the striking out of the civil suit on merits, and only when the striking out prayer is rejected, a stay in favour of arbitration as an alternative, had, by doing so, foreclosed any argument on their part that they had reserved their rights to arbitrate the matter. Again, it must be emphasised that the respondents cannot, by their action, be equated as reserving their rights to refer the matter for arbitration*. We are of the view that the respondents, (except the fourth respondent), by filing encl. 24 to strike out the appellant's writ on merits, or in the alternative, to stay the court proceedings pending the disposal of the arbitration, *had by their conduct, taken steps in the court proceedings pursuant to s. 10(1) of the Arbitration Act 2005. Their conduct had evinced or had signified and affirmed their unequivocal intention and willingness to submit and participate in the court's proceedings to adjudicate the dispute in preference to arbitration*. The respondents, cannot now, change their stance to go for arbitration. The learned judge thus has erred in allowing the proceedings to be stayed against the respondents pending the disposal of the arbitration between the appellant and the first respondent.
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> [44] On perusal of encl. 7 on the stay application by the respondents (except the fourth respondent), we noticed that again, the respondents in their stay application which was premised under s. 10 of the Arbitration Act 2005, had prayed first, for the civil suit to be struck out or second the court action be stayed pending the matter to be referred for arbitration (similar prayers as in their striking out application in encl. 24). Again, we are of the view that the first prayer made by the respondents in their stay application is not in consonant with an application made under s. 10(1) of the Arbitration Act 2005 and, respondents in doing so, had by their alternative prayers foreclosed any argument on their part that they had reserved their rights to arbitrate the matter.
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> (emphasis added)

[29] The learned judge, when deciding to stay the court proceedings, was fully conversant with the above principle enunciated in *Kebabangan Petroleum*'s case (*supra*) when he referred to it in *Golden Plus Holdings Bhd & Ors v. China Idea Development Limited & Ors* [2021] 1 LNS 2083; [2021] MLJU 2532 as follows:

> [97] In a recent Court of Appeal judgment in *Kebabangan Petroleum Operating Co Sdn Bhd v. Mikuni (M) Sdn Bhd & Ors* [2021] 1 MLJ 693 Suraya Othman, JCA held that the filing of an application to strike out constitutes a step in the proceedings and evidences an unequivocal intention to submit to the jurisdiction of the court to adjudicate on the dispute, therefore the applicant was not entitled to a stay of proceedings to arbitrate the matter:
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> ...

[98] Further, it was held in *Kawasaki Kisen Kaisha Ltd v. Owners Of The Ship Or Vessel 'Able Lieutenant'* [2002] 6 MLJ 433, that the applicant therein was plainly wrong for:

(a) on one hand challenging the jurisdiction of the court (pursuant to O. 12 r. 7, Rules of Court 1980); and

(b) on the other hand, seeking the court's jurisdiction to investigate the merits of the plaintiff's claim as disclosed on the writ (pursuant to O. 18 r. 19. Rules of Court 1980)

[99] The court there held that the applicant was blowing hot and cold when it failed to make an election as to whether to challenge the jurisdiction or invoke the court's jurisdiction to hear the case on its merits. The application was dismissed by the court, and the judge emphasised that:

> **If a party wishes for the court to set aside a writ or strike out the writ, it is incumbent upon that party to place before the court in clear unambiguous terms the expectation**.
>
> (emphasis added)

[30] With the greatest of respect to the learned judge, we are of the considered opinion that it was not open to him to say that in the application for striking out the plaintiff's claim was not an invitation to the court to determine the merits of the case but to enforce the arbitration agreement, unlike the facts in the case of *Kebabangan Petroleum* (*supra*). Such a distinction is one without a difference as invariably under O. 18 r. 19(1)(b) of the ROC 2012, when invoking the jurisdiction of the court to strike out the plaintiff's claim on the ground that it is scandalous, frivolous and vexatious, "the court will certainly have to determine the merits of the appellant's claim in order to adjudicate on the veracity of the same." See *Kebabangan Petroleum* (*supra*) at para. [39].

[31] The learned judge was fully conscious of and conversant with the principle expounded in *Kawasaki Kisen Kaisha, Ltd v. Owners Of The Ship Or Vessel "Able Lieutenant"* [2002] 7 CLJ 478; [2002] 6 MLJ 433 where the applicant there was plainly wrong to on one hand, challenge the jurisdiction of the court (pursuant to O. 12 r. 7 of the Rules of the High Court 1980) and on the other hand, seeking the court's jurisdiction to investigate the merits of the plaintiff's claim as disclosed in the writ (pursuant to O. 18 r. 19 of the Rules of the High Court 1980).

[32] The learned judge had in para. [99] of his judgment in the *Golden Plus Holding*s' case (*supra*) commented that the court there held that the applicant was blowing hot and cold when it failed to make an election as to whether to challenge the jurisdiction or invoke the court's jurisdiction to hear the case on its merits. All too often, one cannot have the cake and eat it. One cannot have the best of both worlds. One must make a choice and live with the consequences of one's choice.

[33] The initiative of the defendant in making the application to strike out the plaintiff's claim is not innocuous but inimical to the defendant for a greater consequence is at stake as fully appreciated by the Court of Appeal in *Kebabangan Petroleum*'s case (*supra*) as follows:

> [40] ... *In the event that encl. 24 [striking out] is allowed in favour of the respondents, this would have created some form of estoppel or res judicata which would preclude the appellant from bringing the same claim against the respondents before the arbitral tribunal.*
>
> [41] Based on these reasons, we were of the view that the filing of encl. 24 [the striking out application] had clearly evinced an unequivocal intention on the part of the respondents to submit to the court's jurisdiction and proceed with the civil suit. The respondents' act or conduct in filing encl. 24 clearly indicated to us that *they were willingly taking a step to participate in the proceedings in preference to arbitration*.
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> (emphasis added)

[34] Our Court of Appeal endorsed the approach taken by the full Bench in the Singapore Court of Appeal in the case of *L Capital Jones Ltd And Another v. Maniach Pte Ltd* [2017] SGCA 3; [2017] 1 SLR 312 which was even more explicit in expounding the consequences that would follow an application to strike out a plaintiff's claim by a defendant on the ground that there is an arbitration clause on facts strikingly similar to the present case as follows:

> 78. *An application to strike out proceedings on the basis that it is unmeritorious is an act that signifies a submission to the court's jurisdiction to resolve the dispute on the merits* (*Carona Holdings* at [93]). Far from repudiating the court proceedings, an application to strike out a claim on its merits is an affirmation of the court's jurisdiction to resolve the matter. Further, ... should the court have determined the striking-out application in JtGGH's favour, this would have created some form of estoppel or *res judicata*, precluding the matter from being relitigated before an arbitral tribunal. Thus, filing an application to strike out S 182/2015 on its merits certainly evinces "an unequivocal intention to participate in the court proceedings in preference to arbitration" (*Carona Holdings* at [55]).
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> ...
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> 80. It can be seen that one of the two grounds for striking out relied on by JtGGH was, in essence, that the Respondent's claim lacked merit (para 3 of the grounds of application). A stay in favour of arbitration was only prayed for in the alternative. In our judgment, this forecloses any argument that JtGGH had reserved its right to arbitrate the matter. SUM 998/2015 *clearly prays first for a striking out on the merits, and, only if that was rejected, a stay in favour of arbitration as an alternative. Therefore, by filing SUM 998/2015, JtGGH had taken a step in the proceedings.*
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> 81. The Judge, however, found that because JtGGH never followed through on its intention to strike out the suit, it did not ultimately take a step in the proceedings. JtGGH did not in fact present oral arguments

to the court on the merits of the suit (the GD at [109]), and the part of the application to strike out S 182/2015 under O. 18 r. 19 was never ultimately heard or argued (the GD at [86]). On this basis, the Judge found that even though JtGGH had filed SUM 998/2015, when viewed as a whole, it cannot be treated as having taken a step in the proceedings.

82. In our respectful view, the Judge erred in finding that a step in the proceedings had not been taken by JtGGH just because the striking out application was not pursued at the oral hearing. We note, momentarily leaving aside the issue of JtGGH's striking out application in SUM 998/2015, that JtGGH had taken the following further steps to advance its application to strike out S 182/2015 on its merits: ...

83. In this case, given the several steps that JtGGH took to advance its striking out application on the merits, it cannot be said that JtGGH did not take a step in the proceedings just because it decided not to pursue its striking-out application at the last moment. But *even assuming that JtGGH had not yet filed any affidavits or submissions in support of its striking out application, we would have been inclined to hold that the very act of filing an application to strike out the suit on its merits would have constituted a step in the proceedings because, as we have noted at [78] above, this was an invocation of the court's jurisdiction. Once such a step is taken, it will generally be irrevocable. Even if the application is subsequently withdrawn, or the party indicates that it no longer wishes to prosecute the application, that cannot change the fact that a step has been taken under s. 6(1) of the IAA.*

(emphasis added)

[35] Clearly the defendant by its main prayer in applying to strike out the plaintiff's claim was inviting and invoking the jurisdiction of the court to hear the plaintiff's claim on its merits. The defendant had filed an affidavit in support of its application through its director MIHN dated 6 April 2022 and a further affidavit in reply dated 19 May 2022 giving reasons why the suit should be struck out.

[36] The defendant had thus submitted and surrendered to the jurisdiction of the court and waived its right to arbitration. Having succumbed to the court's jurisdiction, the defendant cannot now switch to arbitration to resolve the dispute between the parties.

Whether The Arbitration Agreement Has Become Inoperative Within The Meaning Of Section 10 Of The AA 2005

[37] Assuming for a moment that the defendant had not taken a further step in the court proceedings, we shall proceed to consider if the arbitration agreement had nevertheless become inoperative by the conduct of the defendant in refusing to pay its share of the AIAC's deposit in the arbitration proceedings.

[38] It is now established without a doubt that in an application under s. 10(1) of the AA 2005, where no further step in the court proceedings has been taken, the court has no discretion but to make an order staying the

A proceedings once there is an arbitration agreement unless the proviso applies *ie*, "unless it finds that the agreement is null and void, inoperative or incapable of being performed." See the Federal Court case of *Press Metal Sarawak Sdn Bhd v. Etiqa Takaful Bhd* [2016] 9 CLJ 1; [2016] 5 MLJ 417.

B **[39]** AIAC had by its letter dated 4 September 2020 to the solicitors for both parties to request under r. 6 of the AIAC Arbitration Rules 2018 for further deposits from the parties which shall be payable within 21 days upon receipt of the said request. The further deposit was for RM360,234.68 and that the plaintiff as claimant and the defendant as respondent in the arbitration was each required to pay to AIAC the sum of RM180,117.34.
C Both parties had earlier paid to AIAC a provisional advance deposit of RM77,268.15 each. The plaintiff had paid the further deposit of RM180,117.34 on 7 May 2021.

[40] The refusal of the defendant in making a further deposit to the arbitrator's fees would amount to a breach of the arbitration rules, in this case
D the AIAC Arbitration Rules. It is provided in cl. 66.3 of the PWD 203A (Rev.1/2-10) contract dated 9 April 2015, used with relevant modifications, that the arbitration shall be by an arbitrator appointed by the Director of the AIAC (previously known as the Regional Centre for Arbitration in Kuala Lumpur as was so referred to in the PWD 203A contract). It was further
E provided that the arbitration shall be conducted in accordance with the rules for arbitration of the AIAC using the facilities and the system available at the AIAC. The defaulting party would have to take the consequences arising under the Rules as provided for in the AIAC Arbitration Rules.

F **[41]** Compliance with an arbitration agreement would include compliance with the applicable AIAC Arbitration Rules that the parties have agreed to abide by. A breach of the Rules would result in taking the consequences that would ensue. Here, the arbitrator is doing what is allowed under the Rules which, in this case, includes the arbitrator exercising his right to terminate the arbitration.

G **[42]** The defendant cannot, in all honesty, say and indeed it would be hollow, for it to say that it is committed to having the dispute that has arisen between the parties to be resolved through arbitration and yet not be willing to abide by the Rules governing the arbitration to pay its share of the AIAC's deposit which includes the arbitrator's fees.

H **[43]** It becomes more disturbing when the argument for not paying the AIAC's deposit is justified on the ground that it has a choice not to and that there can be no adverse consequences that would befall it as its commitment to the arbitration proceedings has always been firm and remains unchanged.

I

[44] The party refusing to pay its share of the arbitrator fees knows fully well that there is no more effective way to tax the financial resources of the other party than by compelling it to pay the refusing party's share of the AIAC's deposit if the other party is keen to have the arbitrator continue with the hearing until an award is handed down.

[45] For as long as the arbitration proceedings continue under the financing of the paying party, the refusing party would just have to ride on the goodwill of the paying party. We can think of no more belligerent action on the part of the refusing party to inflict suffering and punishment on the paying party and to expose it to greater risk of inability to recover the fees paid on its behalf in the award of costs.

[46] To say that such an action on the part of the refusing party is a perfectly proper strategy to adopt in an arbitration with no fear of adverse consequences would be to give applause and approval to such an unsavoury act. We can imagine a scenario where both sides to the dispute declared from the mountaintop that they remain committed to arbitration to resolve their dispute one with the other, and yet both refuse to contribute their share to the arbitrator's fees.

[47] Would it not be a case where the arbitration would not even get off the ground for no arbitrator would want to carve out time to arbitrate with his fees not paid? Would it then be a case where one of the parties who would not be able to endure longer without vindicating itself in proving the genuineness and righteousness of its claim before limitation sets in, be the one that has to pay both its share of the AIAC's deposit as well as that of the refusing party? If that be the case, a party who has no defence or a bad case would be in a better position not to want to pay its share of the arbitrator's fees simply because it has an option not to want to pay and yet its action has to be interpreted as being consistent with its stand that it is committed to the arbitration!

[48] We can think of no better strategy to adopt to bring the arbitral process and proceedings into disrepute. The refusing party's action in not wanting to pay its share of the AIAC's deposit simply by saying it is not keen to and that it has a choice not to, must be exposed and excoriated for what it truly is: a subtle but sly strategy to scuttle the arbitration with impunity for the other party would have no choice but to pay the refusing party's share of the AIAC's deposit if it has more to lose by not continuing with the arbitration.

[49] We do not have to trouble ourselves to determine if there has been a repudiatory breach of the arbitration agreement by the resolute refusal of one party to pay its share of the arbitrator's fees. The determinative factor is whether the parties insisting on arbitration because there is an arbitration agreement have nevertheless evinced an intention to waive arbitration in favour of litigation by taking a further step in the court proceedings and by making the arbitration agreement inoperative by its action or inaction. Thus,

A even when a party files a suit in court in spite of an arbitration agreement, there is no need to determine if the other party has repudiated the arbitration agreement but whether the other party has forgone arbitration by, for example, taking further steps in the court proceedings.

B **[50]** If the defendant applies for a stay before taking a further step in the proceedings in court, all it is doing is to enforce the arbitration agreement and the court would generally grant a stay of the court proceedings. If it has taken a step in the court proceedings, then it is said to have submitted to the jurisdiction of the court and to have waived its right to arbitrate. It would appear that the question of repudiation of an arbitration agreement does not C arise but is more a question of whether the party wanting to proceed with arbitration has abandoned or waived its right to so proceed.

[51] It appears to us that it would be illusory to ask the question of whether there has been a repudiation of the arbitration agreement before the other party is at liberty to proceed with litigation once the arbitrator has decided D to terminate the arbitration. After all, the choice of arbitration is merely a choice as to mode of resolving a dispute and courts would generally hold parties to the bargain once there is a binding arbitration agreement and parties have not abandoned it by taking a further step in proceedings before the court.

E **[52]** It is little wonder that the expression "breach of the arbitration agreement" is not used in s. 10 of the AA 2005 or, for that matter, anywhere in the AA 2005, but rather the arbitration agreement is "null and void, inoperative or incapable of being performed." It would be fair for us to surmise that the test to be applied for the arbitrator to decide on whether to F stay or terminate the arbitral proceedings would be whether the arbitration agreement has become inoperative through the refusal of one party to pay its share of the arbitrator's fees and that it has waived its right to arbitration when it refuses to comply with the applicable AIAC Arbitration Rules which has been incorporated as a term of the arbitration agreement under cl. 66.3 G of the PWD 203A contract.

[53] To compel the other party to pay the refusing party's share of the arbitrator's fees cannot be right for it would be rewarding the uncooperative and unfair party and punishing the party who would then have no choice but to have to pay the belligerent party's share of the arbitrator's fees and then H hopefully to be able to claim it back later as part of the final award of the arbitrator.

[54] There is no clearer means of rendering an arbitration agreement inoperative than a simple but stubborn refusal of a party to pay its share of the administrative body's deposit for no other reason than it does not want I to, though couched euphemistically as a commercial decision. The Court of Appeal in *Kebabangan Petroleum*'s case (*supra*) had no difficulty in holding as follows:

> [35] We were of the view that the first respondent's conduct in unreasonably and deliberately delaying the payment of its portion of the provisional advance deposit or *the first respondent's persistence in refusing to pay and its sheer unresponsiveness and callous disregard to the letters issued by the appellant and KLRCA, had rendered the arbitration agreement between the appellant and the first respondent inoperative.* The conduct of the first respondent had indicated that it was *disinterested and is abandoning its intention to proceed with the arbitration, thereby waiving its rights for arbitration* under the Umbrella Agreement.
>
> (emphasis added)

[55] To refuse to pay its share of the arbitrator's fees for no reason other than it does not want to would be evincing a clear and unequivocal intention not to abide by the arbitration process of resolving the disputes and, indeed, to abandon it altogether. It is akin to stultifying the arbitration, if not to suffocate and even sabotage it. Its conduct, of a wilful and unexplained refusal to pay the additional deposit to the arbitrator's fees, is found wanting and like the writing on the wall, it is a waiver of its right to arbitration written in its body language of crossed arms, resisting every encouragement that it should pay its share of the arbitrator's fees.

[56] If one has to decide the matter on whether there has been a repudiation of the arbitration agreement, then we would say that we know of no clearer repudiation of an arbitration agreement than to refuse to abide by the Arbitration Rules with respect to paying its share of the arbitrator's fees or the administrative body's deposit. The refusing party knows full well that for it not to comply with the other Rules on the filing of defence or counterclaim or the directions of the arbitrator, would have dire consequences. The arbitral institution and the arbitrator appointed must be equally zealous in sending the message that the refusing party cannot avowedly affirm that it is still abiding by the arbitration agreement when it has, with aloofness and apathy, acted to delay and derail the process by its commitment not to pay its share of the arbitrator's fees and the arbitral institution's administrative fees.

[57] The relevant AIAC Arbitration Rules read as follows:

> Rule 14
>
> deposits
>
> ...
>
> (1) After the arbitration has commenced in accordance with Rule 2, *the Director shall fix a provisional advance deposit in an amount intended to cover the costs of the arbitration*. Any such provisional advance deposit *shall be paid by the Parties in equal shares* and will be considered as a partial payment by the Parties of any deposits of costs fixed by the Director under Rule 14.
>
> (2) Such provisional advance deposit *shall be payable within 21 days upon receiving the request from the AIAC*.

A (3) *In the event that any of the Parties fails to pay such deposit, the Director shall give the other Party an opportunity to make the required payment within a specified period of time*. The arbitral tribunal shall not proceed with the arbitral proceedings until such provisional advance deposit is paid in full.

(4) Upon fixing of *the fees of the arbitral tribunal and administrative costs of* B *arbitration*, the Director shall prepare an *estimate of the fees and expenses of the arbitral tribunal and the administrative costs of the arbitration which the Parties shall bear in equal shares. Within 21 days of written notification by the AIAC* of such estimate, each Party shall deposit its share of the estimate with the AIAC.

(5) During the course of the arbitral proceedings the AIAC may request C further deposits from the Parties which shall be payable within 21 days upon receiving the request from the AIAC.

(6) Notwithstanding Rule 14(4), where counterclaims are submitted by the Respondent, the Director may fix separate advance deposits on costs for the claims and counterclaims. When the Director has fixed separate advance deposits on costs, each of the Parties shall pay the advance D deposit corresponding to its claims.

(7) *If the required deposits are not paid in full, the Director shall give the other Party an opportunity to make the required payment within a specified period of time. If such payment is not made, the arbitral tribunal may, after consultation with the Director, order the suspension or termination of the arbitral proceedings or any part* E *thereof.*

(emphasis added)

[58] Parties cannot agree to arbitration under the AIAC Arbitration Rules and yet refuse to follow its rules on the ground that it has an inherent right not to abide by it with no consequences. The AIAC Arbitration Rules have F become incorporated into the arbitration agreement of the parties such that the parties must take the consequences for its non-compliance or breach.

[59] The mandatory language of "shall" with respect to r. 14(1) and (4) makes it an obligation of the parties to make payment of the deposit towards the arbitrator's fees and the administrative costs of AIAC in equal shares to G AIAC within 21 days of written notification from AIAC.

[60] If the obligation to pay is not discharged by the refusing party, under r. 14(7) of the AIAC Arbitration Rules, the Director of AIAC shall give the other party an opportunity to make the required payment within a specified period of time. If such payment is not made, the arbitral tribunal may, after H consultation with the director, order the suspension or termination of the arbitral proceedings or any part thereof. Similar rules are found in r. 34.6 of the Arbitration Rules of the Singapore International Arbitration Centre, r. 4 of the Permanent Court of Arbitration Arbitration Rules 2012, art. 43 para. 4 of the UNCITRAL Arbitration Rules 2021.

I **[61]** Here the arbitrator had, after such consultation with the Director of AIAC, being the administrative body for the arbitration, ordered the termination of the arbitral proceedings. This comes as no surprise, for there

was no mitigating factor put forward by the refusing party not to pay its share of the deposit. The arbitrator wrote to the parties on 25 October 2021 as follows:

> I refer to the trail of emails in relation to payment of preliminary deposits and the respective parties' stand expressed in their email.
>
> I have accordingly consulted with the Director of AIAC pursuant to Rule 14(7) of the AIAC Rules.
>
> After consulting the Director, I hereby issue this Order to Terminate the above arbitral proceedings. Parties are to take note that the Director has determined and approved the sum of RM65,000.00 to be a reasonable sum for the remuneration of the Arbitrator's fees for the work done and further, the Director has determined and approved the sum of RM16,559.76 to be the total Administrative Fees, is reasonable for the remuneration of the AIAC.

[62] One cannot read an obligation to pay one's share of the deposit as now being transposed onto the other party to pay once an opportunity is given to the other party to pay. The opportunity given to the other party is an option given to the other party to pay the refusing party's equal share of the deposit after the other party has already paid its equal share of the deposit. Such an opportunity to exercise an option does not convert the option into an obligation.

[63] Here, the other party in the plaintiff chose not to exercise the option for it does not make sense to incur further expenses in the AIAC's deposit with no certainty of being able to recover it. Indeed, the refusal to pay on the understanding that it has a right to do so would raise the suspicion as to whether it would be able to recover the deposit paid should it succeed in the arbitration.

[64] Being a domestic arbitration, perhaps the benefits of arbitration in terms of party autonomy and confidentiality are not prejudicially subordinated to a trial in open court, which would certainly be cheaper and no less fast. A judge hearing the case is sworn by his judicial oath to uphold the law, and he cannot be less qualified or less independent than an arbitrator. As for the benefit of confidentiality, it may be more highly touted than what it deserves, for transparency of proceedings would be an equal benefit as well. Moreover, when appeals are pursued, so much of what is the dispute would have to be narrated by the court as part of its reported judgment. Granted, where necessary, the court may anonymise and "acronymise" the names of the parties and the construction project.

[65] As an option, it is given to the other party to decide whether or not it wants to affirm the arbitration agreement in spite of its breach by the refusing party. In the case of an international arbitration, a foreign party unfamiliar with the court proceedings in a foreign State and the language used

in the court, may elect to continue with the arbitration, in which instance it may have to advance the refusing party's share of the AIAC's deposit and claim back later in the final accounting in the arbitral award.

[66] It would, in all probabilities, apply to the arbitrator for security for costs under s. 19(1) and under s. 19(2)(e) of the AA 2005 of the arbitral tribunal may require any party to provide appropriate security in connection with such measures as may be ordered by the arbitral tribunal. In default of the order to provide the amount as may be ordered for security for costs, the arbitral tribunal may bar the refusing party from proceeding with its claim or defending the claim or proceeding with its counterclaim. See also s. 21(3)(d) and (i) of the AA 2005.

[67] The other party in the plaintiff, in the case before us, has no compunction in proceeding to court with the claim as it had previously commenced a suit against the defendant, only to have it withdrawn because of the defendant's insistence to proceed with arbitration as there was an arbitration agreement.

[68] The arbitration agreement had been rendered inoperative by the refusal of the defendants to comply with the requirement of the AIAC Arbitration Rules that each party shall contribute equally towards the AIAC's deposit or further deposit to cover the arbitrator's fees and the AIAC's administrative costs. It is an inconsistent and untenable position for the defendant to take, that its refusal to pay its share of the AIAC's deposit does not in any way affect the validity of the arbitration agreement.

[69] The non-payment of the arbitrator's fees would have the effect of scuttling the arbitration for there is no good reason not to pay equally the AIAC's deposit and claim back from the losing party. The reason here is simply that the defendant does not want to pay. We fail to see how that is not calculated towards derailing the arbitration. Agreeing to arbitration comes together with agreeing to comply with the Rules governing the arbitration. Breach of the Rules would attract consequences.

[70] Such a breach is a material breach for the payment of the AIAC's deposit is to facilitate the hearing of the arbitration and its non-payment has the effect of frustrating the arbitration and depriving the other party of the benefit of their bargain. Such a breach would bar the defendant from compelling arbitration when it has manifested no commitment to it and indeed worked towards delaying and derailing it.

[71] In other words, the defendant is, in effect, saying that its breach of the AIAC Arbitration Rules under which the arbitration is to be conducted does not in any way affect the valid and binding agreement to arbitrate. We do not agree. Breach of the Rules, would in the circumstances of this case, result in the arbitrator having to exercise its power under the Rules which would include the power to terminate the arbitration proceedings.

[72] Clearly, the defendant is not entitled to take advantage of its own breach and insist on continuing with the arbitration. It would be a case of the defendant not walking its talk. The practical effect of not paying one's share of the arbitrator's fees would be that the arbitrator is not obliged to continue with the hearing and may indeed terminate the arbitration before him. Parties are then at liberty to pursue litigation in court as the arbitration agreement has been rendered inoperative. The refusing party that has defaulted in the equally binding contractual obligation to pay its share of the AIAC's deposit cannot insist on wanting the benefits of arbitration without wanting to pay the costs that come with it.

[73] We need to go no further than to quote the Court of Appeal in *Dato' Abd Rahim Mohamad v. Abdul Farish Rashid* [2009] 1 CLJ 395, where it was held as follows:

> [6] We find it unnecessary to quote at length from the several authorities cited to us. Suffice to say that there is a presumptive rule of construction that a party is not to be permitted to take advantage of his own wrong. See *Cheall v. Association of Professional, Executive, Clerical and Computer Staff* [1983] 1 All ER 1130; *Alghussein Establishment v. Eton College* [1991] 1 All ER 267. And we consider the head note of the latter authority to represent the law as it now stands on the point.
>
> The principle that in the absence of clear express provisions in a contract to the contrary it was not to be presumed that the parties intended that a party should be entitled to take advantage of his own breach as against the other party was not limited to cases where a party was relying on his own wrong to avoid his obligations under the contract but **applied also where a party sought to obtain a benefit under a continuing contract on account of his breach**.
>
> (emphasis added)

[74] We are not unaware of the case of *BDMS Limited v. Rafael Advanced Defence Systems* [2014] EWHC 451 (Comm) where the High Court in England held that the failure of the respondent to pay its share of the advance on costs in an ICC arbitration, did not in the circumstances of the case, amount to a repudiatory breach of the arbitration agreement. The High Court held at para. [57] as follows:

> (1) This is not a case in which the defendant was refusing to participate in the arbitration. It was in fact actively participating in the arbitration, as illustrated by its involvement in the settling of the TOR and in exchanges as to the scope of the preliminary issue hearing. *Its refusal to 'play by the rules' was limited to the issue of payment of its advance share on costs, a matter which was due to be addressed at the forthcoming preliminary issue hearing. Further, the refusal was not absolute, but was a refusal to pay unless security for costs was provided.*
>
> (emphasis added)

[75] Eamon and Holub in their article titled "*See you in court! Respondents' failure to pay the advance in on arbitration costs*" (2009) Int ALR 168 have expressed the following view that resonates with this court:

> *The refusal by a party respondent to pay its share of advance costs, where this places the arbitration in jeopardy of termination, should give rise to an option in the non-defaulting party claimant to proceed with a suit in the appropriate domestic court on the ground that the arbitration agreement has been rendered inoperative. claimants [sic] should not be compelled to post a defaulting party's share of an advance deposit, unless the applicable rules or arbitration agreement clearly require it to do so.*
>
> The *Resin* court rightly concluded that a respondent who thumbs its nose at its obligations under arbitration will not be entitled to paralyse the arbitral process, force the innocent party, who wishes to avoid that state of limbo, to pay amounts which the respondent promised to pay, or create delay and uncertainty through litigation over the effect of non-payment.
>
> *The Resin remedy, if embraced, should encourage compliance with international arbitration obligations and discourage dilatory tactics, and in doing so, provide a greater measure of certainty and predictability to the issue of the forum in which to pursue dispute resolution.*
>
> (emphasis added)

[76] The High Court in the case of *Lion Pacific Sdn Bhd v. Pestech Technology Sdn Bhd* [2022] 1 LNS 135 para. [42], decided that in the event the defendant refuses to pay its share of the AIAC's deposit, the plaintiff can advance the deposit and in that way, the conundrum in the risk of the arbitration being stalled could be avoided and that the advance can be recouped in the arbitral award subsequently if the claim is eventually decided in favour of the plaintiff. The High Court did not appear to have considered that under r. 14(7) of the AIAC Arbitration Rules, the Director of AIAC would give an opportunity to the plaintiff to pay the AIAC's deposit but that option given is not an obligation and it is expressly provided that if the payment is not made then the arbitrator may, after consultation with the director, terminate the arbitration.

[77] The default position once the arbitration agreement has become inoperative through the belligerent action and breach of it is that the parties affected may continue with the court proceedings if it has been stayed before under s. 10 of the AA 2005 application or that a fresh action in court may be commenced as in this case. It must not be forgotten that arbitration is an exception to s. 29 of the Contracts Act 1950 [Act 136] (CA 1950), which provides as follows:

> **29 Agreements in restraint of legal proceedings void**
>
> Every agreement, by which any party thereto is **restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings** in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, **is void** to that extent.

Saving of contract to refer to arbitration dispute that may arise

Exception 1 - This section shall not render illegal a contract by which two or more persons agree that any dispute which may arise between them in respect of any subject or class of subjects shall be referred to **arbitration**, and that only the amount awarded in the arbitration shall be recoverable in respect of the dispute so referred.

(emphasis added)

[78] The plaintiff would always be able to enforce its right under the construction contract if the mode of arbitration previously agreed by the parties has been rendered inoperative because of the defendant's refusal to abide by the AIAC Arbitration Rules.

[79] For so long as the court has jurisdiction generally because the cause of action has arisen within the local jurisdiction of the court, the court would assume jurisdiction once its process is activated with the filing of a claim. See the civil jurisdiction of the High Court under s. 23 of the Courts of Judicature Act 1964 (Act 91). Thankfully, there is no need for any party to pay the judge hearing the dispute his salary, for that is taken care of under the Judges' Remuneration Act 1971 (Act 45) by the State.

[80] As the other party is prepared to proceed with litigation seeing that the defendant is stalling arbitration by its stoic stand not to pay its share of the arbitrator's fees, it has no cause for complaint if it no longer enjoys party autonomy and confidentiality of the arbitral process and finality of the arbitral award. That is a detriment which the other party is prepared to accept and so those living in glass houses must be careful not to throw stones.

Whether A Stay Of The Court Proceedings Would Be An Exercise In Futility As The Defendant Had Resolutely Resolved Not To Pay The Arbitrator's Fees

[81] The stand of the defendant has not changed at the application to strike out the plaintiff's claim in court or, alternatively, its application to stay the proceedings in court. If at all, its defensive position has escalated to become more entrenched in that it sees itself having an inalienable and basic right not to pay the deposit towards the AIAC's deposit.

[82] What has started off as an obligation for both sides to pay their equal share of the AIAC's deposit under the AIAC Arbitration Rules and a further opportunity for one to make advance payment for the other with a discretionary extension of time to do so as in an option to pay, has now ossified into an obligation cast on the other party to pay if it is desirous of continuing with the arbitration now at the stage of settling the pleadings.

[83] That being the case, it is not too difficult to imagine what would happen after the court has given a stay of the proceedings in court in favour of the party referring the dispute to arbitration. The defendant would predictably refuse to pay the AIAC's deposit leaving the newly appointed arbitrator to terminate the arbitration.

[84] The defendant has not challenged the arbitrator's order to terminate the arbitration. It is not open to the defendant to want to proceed with another arbitration and to take the same stand of not wanting to pay its share of the AIAC's deposit. The stand taken by the defendant would result in the whole arbitration regime being ridiculed, for the defendant is, in effect, saying that if the next arbitrator still proceeds to terminate the arbitral proceedings for the unchanging stand of the defendant not to pay the AIAC's deposit, then the whole cycle would have to be repeated until an arbitrator is found, who is prepared not to terminate the arbitral proceedings but to make the plaintiff pay the defendant's share of the AIAC's deposit inclusive of the deposit to the arbitrator's fees.

[85] The plaintiff may apply to the court to reinstate the court proceedings previously stayed if there was one or to file a fresh suit in court, as is the case here and the defendant would object to reinstating the court proceedings or apply for yet another stay on the ground that it has always been faithful to keep his side of the bargain which is to proceed to arbitration.

[86] It would be a case of the court having acted in vain in granting a stay of the court proceedings until the plaintiff relents and pays the defendant's share of the AIAC's deposit so as to break the impasse. That would be to allow the defendant to hold the plaintiff to the ransom of having to pay the defendant's share of the AIAC's deposit so that the arbitration may proceed. The court does not and must not act in vain – a maxim attributed to Lord Wilberforce in *Malloch v. Aberdeen Corp* [1971] 1 WLR 1578 and quoted by Edgar Joseph Jr FCJ in *Said Dharmalingam Abdullah v. Malayan Breweries (Malaya) Sdn Bhd* [1997] 1 CLJ 646; [1997] 1 MLJ 352 at p. 360.

[87] It is not unlike a case of the fox chasing its own tail until it is exhausted and decided to throw in the towel, in this case, by paying the defendant's share of the AIAC's fees. That would be rewriting the AIAC Arbitration Rules, turning an option of the other party to pay into an obligation to pay when it has no obligation to pay the defendant's share of the AIAC's deposit.

[88] The doctrine of estoppel applies with equal force to the conduct of parties before an arbitral tribunal such that the conduct of one party not to comply with the requirements of the Rules may operate against its insistence that it nevertheless wants to proceed with arbitration as its non-compliance is inconsequential to the arbitral proceedings continuing till completion with the handing down of an award.

[89] The Court of Appeal in *Lembaga Pelabuhan Kelang v. Kuala Dimensi Sdn Bhd & Another Appeal* [2010] 9 CLJ 532 made the following observations in the context of estoppel operating to prevent abuse of the arbitral proceedings:

> [31] As the parties, original intention to proceed by way of arbitration had been subsequently abandoned, as expressed in cls. 2.4 and 4.4 in DA2 and DA3 respectively, neither of them should be allowed to go back on their

words. Hence, it would be unfair or unjust for KDSB to do so. In other words, the doctrine of estoppel may be invoked. This doctrine of estoppel has been succinctly stated by Lord Denning in the *Amalgamated Investment v. Texas Commerce* [1981] 3 All ER 577 at 584 in the following words:

> When the parties to a transaction proceed on the basis of an underlying assumption (either in fact or of law, and whether due to misrepresentation or mistake, makes no difference), on which they have conducted the dealings between them, neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so. If one of them does seek to go back on it, the courts will give the other such remedy as the equity of the case demands.

[32] In *Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Berhad* [1995] 4 CLJ 283, [1995] 3 MLJ 331, 345F-H, the Federal Court followed this estoppel principle. I would respectfully apply the same principle here.

[33] In my judgment, *the arbitration clause has, by virtue of the submission to the court jurisdiction clauses, been rendered null and void, inoperative or incapable of being performed under s. 10(1)(a). This is one of the exceptional circumstances in which eg, estoppel may be appropriately invoked*.

(emphasis added)

[90] Taking the overall circumstances of the case into consideration, the wilful refusal of the defendant to pay its share of the AIAC's deposits of the arbitrator's fees and AIAC's administrative costs would mean that whilst the plaintiff as claimant in the arbitration has to foot and furnish to AIAC all the arbitrator's fees and AIAC administrative costs including bearing the defendant's share of the fees and costs, the defendant would not have to bear any expenses in defending its claim.

[91] That flies in the face of what the parties had agreed in the arbitration agreement, where the parties have an obligation and not an option to comply with the AIAC Arbitration Rules. It would be undeniably unconscionable of the defendant to insist on continuing with the arbitration but now changing the Rules of the Arbitration.

[92] It is not a case of the plaintiff rewriting the arbitration agreement when it opted for court proceedings after the defendant had obstinately refused to pay its share of the AIAC's deposits but rather a case of the defendant rewriting the Rules of the Arbitration in its attempt to obfuscate its true intent of obstructing the arbitration by declaring that the arbitration must be kept within its orbit.

[93] We can see a case where the refusing party should be estopped from acting unconscionably and unreasonably by the court refusing a stay of the proceedings. That being the case, the problem which the defendant refuses to admit but which it has tried to capitalise on in its resolute refusal to pay the AIAC's deposit would have been solved. In as much as an arbitration agreement is a term of the contract, a refusal to abide by it would free the

other party from its obligation to proceed with the arbitration and instead to opt for a proceeding in court which ordinarily cannot be restrained under s. 29 of the CA 1950.

[94] Both parties are local parties, with the construction contract being undertaken in Malaysia and subject to Malaysian law. The advantage of party autonomy and confidentiality of the arbitral proceedings, touted often as merits for preferring arbitration to litigation, must take a back seat when the defendant is not prepared to cooperate to make the arbitration work. We can see no serious prejudice that the defendant would suffer when it has waived its right to arbitrate, if not repudiated the arbitration agreement by its calculated refusal to pay its share of the AIAC's deposit without any cogent reasons being proffered other than the professional parlance of commercial reason.

[95] In fact, the experience of counsel and judges in the litigation before our courts is that the disputes could be "expeditiously, efficiently and economically prosecuted *via* the court process", as was commented by Justice Nantha Balan J (now JCA) in *AMDAC (M) Sdn Bhd v. BYD Auto Industry Company Ltd* [2020] 6 CLJ 625; [2020] 11 MLJ 281 at para. [166] in a case where the respondent had proposed that the disputes between the parties be litigated rather than arbitrated which proposal if accepted, would have obviated the problem of the appellant's impecuniosity and the inability to pay the deposit towards arbitration costs.

[96] We echo the words of Lord Mustill in *Government of Swaziland Central Transport Administration And Alfko Aussenhandels GMBH v. Leila Maritime Co Ltd An Mediterranean Shipping Co SA (The "Leila")* [1985] 2 Lloyd's Rep 172 at p. 180 as follows:

> ... The question is not whether their standpoint is attractive, but whether it would be conscionable if it were allowed to prevail. Considering the matter in this way I have come to the conclusion that it would not in all the circumstances be conscionable to allow the defendants to insist on the arbitration clause in preference to the English jurisdiction clause.
>
> ...
>
> *... Leaving this aspect aside, however, I conclude for the reasons previously stated that the defendants are estopped from relying on the arbitration clause in the contract of carriage, and that their application for a stay should be dismissed.*
>
> (emphasis added)

[97] We did explore if we could vary the order of unconditional stay of the court proceedings by imposing some conditions that may be deemed fit in the circumstances of this case as the court is allowed to when granting a stay under s. 10(2) of the AA 2005. However, the dogged determination of the defendant in not wanting to pay its share of the AIAC's deposit, even up to the hearing of the appeal before us, leaves us without a doubt that the defendant has taken a calculated stand consistent with the strategy it has adopted.

[98] The defendant sees it as its right not to have to pay to AIAC the deposit required under the AIAC Arbitration Rules and so gave no reason for its stand. No further opportunity to pay would be necessary nor appreciated in this case where the defendant, by its action, has waived its right to arbitration.

[99] We were more than convinced that to stay the proceedings in court would be an exercise in futility and tantamount to the court having acted in vain and frustrating further the plaintiff's attempt to have the dispute heard and resolved with all due diligence and without further delay.

Decision

[100] For the reasons given, we find that the High Court had erred in granting a stay of the court proceedings in favour of a reference to arbitration. The defendant had taken a further step in the proceedings in court and have submitted and surrendered to the jurisdiction of the court when it invited and invoked the court's jurisdiction in applying to strike out the plaintiff's claim under O. 18 r. 19(1)(a), (b), (c) and (d) of the ROC 2012 and under O. 92 r. 4 of the ROC 2012.

[101] Moreover, the arbitration agreement had become inoperative when the defendant refused to pay its share of the AIAC's deposit under the AIAC Arbitration Rules. The defendant, by such an action, has evinced, an intention not to be bound by the arbitration agreement, and the plaintiff was perfectly entitled to proceed to court for the hearing of the dispute between the parties.

[102] We had, therefore, allowed the appeal and set aside the order of the High Court in granting a stay of the High Court proceedings. The appeal is allowed and the order of the High Court is set aside. We awarded costs of RM15,000,00 to the appellant/plaintiff here and below, subject to the allocatur.

[103] The matter shall proceed to trial in the High Court and a case management date was fixed.